THE FEDERAL EMPLOYERS' LIABILITY ACT.*

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4. When Railroad or Employee Engaged in Interstate Commerce.—In determining whether or not an employee was engaged in interstate commerce at the time of his injury most of

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the courts have proceeded upon the theory heretofore stated, namely, that the present act was drawn to obviate the defects which rendered the first act unconstitutional, and that it is to be construed so as to include within the scope of its operation every person whom congress could constitutionally include,[1] not forgetting, however, that the defendant railroad company and the injured employee must both have been engaged in interstate or foreign commerce at the time the injury was sustained.[2] It is not essential, however, that the agency or employee inflicting the injury, or through whose negligence it came about, should also have been employed in such commerce, since the statute gives a right of recovery for injury or death resulting from the negligence "of any of the * * * employees of such carrier," including those engaged in intrastate commerce, the true criterion being, as heretofore pointed out, not whether the agency or employee inflicting the injury was engaged at the time in interstate commerce, but the effect of the negligent act or omission upon such commerce.[3]

1. **Includes every person whom congress could include.**—Colasurdo *v.* Central R. R. of New Jersey (C. Ct. S. D. N. Y. July 1, 1910), 180 Fed. 832, 837, affirmed (C. C. A.) 192 Fed. 901, 113 C. C. A. 379; Kelley *v.* Great Northern Pac. R. Co. (C. C.), 152 Fed. 211; Carr *v.* New York, etc., R. Co. (S. Ct. N. Y.), 136 N. Y. S. 501. See discussion ante, under "Scope of Act," III, C.

2. **Both railroad and employee must have been engaged in interstate commerce.**—Pedersen *v.* Delaware, etc., R. Co., — U. S. — Adv. Sheets 57 L. Ed. 648, 649, — S. Ct. — (Mr. Justice Lamar dissenting), reversing (C. C. A.), 197 Fed. 537, which affirmed (C. C.), 184 Fed. 737; Neil *v.* Idaho R. Co. (Idaho), 125 Pac. 331; Pierson *v.* New York, etc., R. Co. (Err. & App. of N. J., Nov. 21, 1912), 25 Atl. 233; St. Louis, etc., R. Co. *v.* Hesterly, 98 Ark. 240, 135 S. W. 874, reversed, on other points, in — U. S. —, Adv. Sheets, 57 L. Ed. —, 33 S. Ct. —; Lamphere *v.* Oregon, etc., R. Co. (C. C.), 193 Fed. 248, reversed on application of this rule to facts in 196 Fed. 336; Zachary *v.* North Carolina R. Co., 156 N. C. 496, 72 S. E. 858, 859.

3. **Otherwise as to agency or employee inflicting injury.**—Second Employers' Liability Cases, 223 U. S. 1, 51, 56 L. Ed. 327, 346, 38 L. R. A. (N, S.) 44, 32 S. Ct. 169; Pedersen *v.* Delaware, etc., R. Co., 228 U. S. —, Adv. Sheets, 57 L. Ed. 648, 649, 33 S. Ct. —. Mr. Justice Lamar, dissenting; Lamphere *v.* Oregon R., etc., Co. (C. C.), 196 Fed. 336, 340; El Paso, etc., R. Co. *v.* Gutierrez, 215 U. S. 87 54 L. Ed. 106, 30 S. Ct. 21; Colasurdo *v.* Central R. Co. (C. C.) 180 Fed. 832, affirmed 113 C. C. A. 379, 192 Fed. 901; Watson *v.* St. Louis, etc., R. Co. (C. C.), 169 Fed. 942.

And where the same man, at the time of his injury, is engaged upon duties embracing both interstate and intrastate commerce, or is at work upon an instrumentality used indiscriminately for both intrastate and interstate purposes, he is within the terms of the act, and the court will not undertake to separate such service into its intrastate and interstate elements and determine the nature and extent of each without regard to its relation to others or to the business as a whole. Such an attempt, says the Supreme Court of the United States, is based upon an erroneous assumption, and the true test in each case is: Was the work in question a part of the interstate commerce in which the carrier was engaged?[4]

Employees Engaged in Repairing Instruments of Commerce—Generally.—Under a recent decision of the Supreme Court of the United States, employees repairing instrumentalities of interstate commerce, even though such instrumentalities be also used in intrastate commerce, are deemed to be engaged in interstate commerce, and within the protection of the Act of April 22, 1908, in case they sustain injuries while so engaged.[5]

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4. **Employee or instrumentality engaged in both kinds of commerce—Separating service into its elements.**—Pedersen *v.* Delaware, etc., R. Co., 228 U. S. —, Adv. Sheets, 57 L. Ed. 648, 649, 33 S. Ct. —, Justice Lamar dissenting reversing (C. C. A.) 197 Fed. 537, which affirmed (C. C.) 184 Fed. 737. See, in accord, Central R. Co. *v.* Colasurdo, 113 C. C. A. 379, 192 Fed. 901, affirming 180 Fed. 832; Kelley *v.* Great Northern R. Co. (C. C.), 152 Fed. 211.

5. **Employees engaged in repairing instruments of commerce—Generally.**—Pedersen *v.* Delaware, etc., R. Co., 228 U. S. —, Adv. Sheets, 57 L. Ed. 648, 33 S. Ct. —, reversing (C. C. A.) 197 Fed. 537, which affirmed (C. C.) 184 Fed. 737.

The case of Pierson *v.* New York, etc., R. Co. (Ct. of Err. & App. of N. J.), 85 Atl. 233, 235, holding that employees engaged in repairing such instrumentalities are not employed in interstate commerce is expressly based upon the authority of the Circuit Court of Appeals decision in the Pedersen Case (197 Fed. 537), and can not be sustained in the face of the controlling decision of the Supreme Court of the United States reversing the decision of the Circuit Court of Appeals in the Pedersen Case.

The following cases, also based upon the decision of the Circuit Court of Appeals in the Pedersen Case, should be read in the light of the fact that said decision has been reversed. Heimbach *v.* Le-

Employees Repairing Tracks, Bridges, etc., Used in Both Interstate and Intrastate Traffic.—In keeping with the rule above stated, employees engaged in repairing tracks, bridges, switches, etc., used for both internal and interstate traffic are held to be employed in interstate commerce, and to be within the protection of the federal act in case they sustain injuries while so employed.[6] Thus where a railroad trackman was injured while repairing a switch in defendant's terminal yards at night, over which interstate as well as intrastate commerce was continually transported, and the car by which he was struck was being kicked into the station platform at defendant's Jersey City terminal to carry passengers coming on one of defendant's ferry-boats from New York City to a point in New Jersey, the court, laying down and applying the rule just stated, held that he was engaged in interstate commerce, and was therefore entitled to maintain an action for his injuries under the federal act.[7] This case and the principle stated therein has been frequently cited with approval.[8] And so a section hand who was engaged in repairing the defendant's main track, over which both interstate and intrastate traffic passed, by driving spikes in the ties for the purpose of tightening the rails and joints, was held to be engaged in interstate commerce and entitled to recover under the federal act for injuries sustained through the negligence of a fellow serv-

high Valley R. Co. (Dist. Ct. E. D. Penn.), 197 Fed. 579; Feaster *v.* Philadelphia, etc., R. Co. (Dist. Ct. E. D. Penn.), 197 Fed. 580.

6. **Repairing tracks, bridges, etc., used in both interstate and intrastate traffic.**—Pedersen *v.* Delaware, etc., R. Co., 228 U. S. —, Adv. Sheets, 57 L. Ed. 648, 649, 33 S. Ct. —, reversing (C. C. A.) 197 Fed. 537, which affirmed (C. C.) 184 Fed. 737; Central R. Co. of N. J. *v.* Colasurdo, 113 C. C. A. 379, 192 Fed. 901, affirming 180 Fed. 832; Zikos *v.* Oregon R., etc., Co. (C. C.), 179 Fed. 893; Jones *v.* Chesapeake & O. R. Co. (Ct. of App. Ky.), 149 S. W. 951.

7. **Repairing switch in yard or terminal.**—Central R. Co. N. J. *v.* Colasurdo, 113 C. C. A. 379, 192 Fed. 901, affirming 180 Fed. 832.

8. **Same—Case approved.**—Northern Pac. R. Co. *v.* Maerkl (Circuit Court App. Ninth Cr. Aug. 5, 1912), 198 Fed. 1, 5; Lamphere *v.* Oregon B. & Nav. Co. (C. Ct. App. 9th Cir. May 6, 1912), 196 Fed. 336, 338; Carr *v.* New York, etc., R. Co. (S. Ct. N. Y.), 136 N. Y. S. 501, and many others.

ant also engaged in such commerce.[9] And a fortiori as to a section hand, injured while engaged in repairing a switch so as not to delay interstate freight and passenger trains.[10]

In the Pedersen Case, the evidence, as reported in the opinion of the Federal Supreme Court, was to the following effect: The defendant was operating a railroad for the transportation of passengers and freight in interstate and intrastate commerce, and the plaintiff was an iron worker employed by the defendant in the alteration and repair of some of its bridges and tracks at or near Hoboken, New Jersey. On the afternoon of his injury the plaintiff and another employee, acting under the direction of their foreman, were carrying from a tool car to a bridge, known as the Duffield bridge, some bolts or rivets which were to be used by them that night or very early the next morning in "repairing that bridge," the repair to consist in taking out an existing girder and inserting a new one. The bridge could be reached only by passing over an intervening temporary bridge at James avenue. These bridges were being regularly used in both interstate and intrastate commerce. While the plaintiff was carrying a sack of bolts or rivets over the James Avenue bridge, on his way to the Duffield bridge, he was run down and injured by an intrastate passenger train, of the approach of which its engineer negligently failed to give warning. On this statement of facts the Supreme Court of the United States, three of the justices dissenting, held that the plaintiff was engaged in interstate commerce at the time of his injury, and entitled to the benefit of the federal act.[11] The law, as it must now be taken to exist, is thus laid down in the majority opinion:

"Tracks and bridges are as indispensable to interstate commerce by railroad as are engines and cars; and sound economic

9. **Employee repairing main line.**—Zikos *v.* Oregon R., etc., Co. (C. Ct. E. D. Wash., E. D. June 4, 1910), 179 Fed. 893.

10. **Repairing switch to prevent delay of interstate trains.**—Jones *v.* Chesapeake & O. R. Co. (Court of App. Ky. Oct. 1, 1912), 149 S. W. 951.

11. **Repairing bridges—Injury sustained while carrying material used in work.**—Pedersen *v.* Delaware, etc., R. Co., — U. S. —, Adv. Sheets, 57 L. Ed. 648, — S. Ct. — (reversing (C. C. A.) 179 Fed. 537, which affirmed (C. C.) 184 Fed. 737). Mr. Justice Lamar with whom concurred Justices Lurton and Holmes, dissenting.

reasons unite with settled rules of law in demanding that all of these instrumentalities be kept in repair. The security, expedition and efficiency of the commerce depends in large measure upon this being done. Indeed, the statute now before us proceeds upon the theory that the carrier is charged with the duty of exercising appropriate care to prevent or correct 'any defect or insufficiency * * * in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment' used in interstate commerce. But independently of the statute, we are of opinion that the work of keeping such instrumentalities in a proper state of repair while thus used is so closely related to such commerce as to be in practice and in legal contemplation a part of it. The contention to the contrary proceeds upon the assumption that interstate commerce by railroad can be separated into its several elements, and the nature of each determined regardless of its relation to others or to the business as a whole. But this is an erroneous assumption. The true test always is: Is the work in question a part of the interstate commerce in which the carrier is engaged?"[12]

And again:

"True, a track or bridge may be used in both interstate and intrastate commerce, but when it is so used it is none the less an instrumentality of the former; nor does its double use prevent the employment of those who are engaged in its repair or in keeping it in suitable condition for use from being an employment in interstate commerce."[13]

Answering the contention that the plaintiff was not, at the time of his injury, engaged in removing the old girder and inserting the new one, but was merely carrying to the place where that work was to be done some of the materials to be used therein, the court says:

"We think there is no merit in this. It was necessary to the repair of the bridge that the materials be at hand, and the act of taking them there was a part of that work. In other words, it was a minor task which was essentially a part of the larger one, as is the case when an engineer takes his engine from the roundhouse to the track on which are the cars he is to haul in interstate commerce."[14]

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12. Pedersen *v.* Delaware, etc., R. Co., Adv. Sheets, 57 L. Ed. 648, 649.

13. Pedersen *v.* Delaware, etc., R. Co., Adv. Sheets, 57 L. Ed. 648, 650.

14. Pedersen *v.* Delaware, etc., R. Co., — U. S. —, Adv. Sheets,

The practical effect of the Pedersen Case is to extend, by construction, the operation of the Act of 1908 until it is nearly or quite as broad in its scope as the Act of 1906, which was declared unconstitutional as an attempt to regulate that commerce which is wholly internal; thus once again reminding us of Mr. Justice Daniel, who was of the opinion that the "vortex of federal encroachment is of a capacity ample enough for the engulfing and retention of every power," and who in an early case voiced his sentiments with respect thereto in the following language: "For myself, I would never hunt with the lion. I would anxiously avoid his path; and as far as possible keep him from my own; always bearing in mind the pregnant reply told in the Apologue as having been made to his gracious invitation to visit him in his lair; that although in the path that conducted to its entrance, innumerable footprints were to be seen, yet in the same path there could be discerned 'Nulla vestigia retrorsum.' "[15]

In view of the decision in the Pedersen Case, the decision in Taylor *v.* Southern R. Company,[16] in which it was held that a member of a railroad bridge gang, whose duties required work in the repair of bridges in different states, and who was injured while engaged within the scope of his employment in repairing a bridge on defendant's main line by an alleged defective scaffold, was not employed in interstate commerce, can not be sustained.

Original Construction of Instrumentalities.—On this point we quote the following excerpt from the majority opinion in the Pedersen Case:

"Of course, we are not here concerned with the construction of tracks, bridges, engines, or cars which have not as yet become instrumentalities in such commerce, but only with the work of

57 L. Ed. 648, 650, citing the following cases: Lamphere *v.* Oregon R. & Nav. Co. L. R. A. (N. S.), 116 C. C. A. 156, 196 Fed. 336; Horton *v.* Oregon Washington R. & Nav. Co., — Wash. —, 130 Pac. 897; Johnson *v.* Southern P. Co., 196 U. S. 1, 21, 49 L. Ed. 363, 371, 25 S. Ct. 158.

15. Marshall *v.* Baltimore, etc., R. Co., 16 How (U. S.) 314, 346, 347, 14 L. Ed. 953.

16. Cases out of line with Pedersen Case.—Taylor *v.* Southern R. Co. (C. C. N. D. Ga.), 178 Fed. 380.

maintaining them in proper condition after they have become such instrumentalities and during their use as such."[17]

The plain intimation of this language is that employees engaged upon the original construction of such instrumentalities, and before they have been used in interstate commerce, are not employed in such commerce.

Employees Engaged in Repairing Cars in Repair Shops.—Where an employee of the defendant, an interstate railroad company, was injured, in part through the negligence of a fellow servant, when working in repair shops connected with an interstate track, engaged in repairing a car used by the defendant indiscriminately in both interstate and intrastate commerce as occasion required, it was held that the defendant was at the time "engaged in interstate commerce," and that the employee was employed by the defendant in such commerce, within the meaning of the Employers' Liability Act of April 22, 1908, and that an action for his injury or death could be maintained thereunder.[18]

It appeared from the evidence in this case that the place where the repairing was done was on the main line of the defendant company between Tacoma, Wash., and Portland, Ore., and was connected with it by switches over which the cars needing repairs were run, and over which, after repairing, they were again put into the service of the company for use in interstate and intrastate commerce as occasion required. It was agreed that the particular car upon which the deceased was at work when injured had been for a long time indiscriminately used in interstate and intrastate commerce, and was to be again so used when repaired. Commenting upon these facts, the court said:

"That a car so used is one of the instruments of interstate commerce does not admit of doubt. It is equally plain, we think, that those engaged in the repair of such a car are as much engaged in interstate commerce as the switchman who turns the

17. **Original construction of instrumentalities.**—Pedersen *v.* Delaware, etc., R. Co., Adv. Sheets, 57 L. Ed. 648, 650.

18. **Repairing cars—In repair shops.**—Northern Pac. R. Co. *v.* Maerkl (Circuit Ct. App. Ninth Cr. Aug. 5, 1912), 198 Fed. 1. See, also, Lamphere *v.* Oregon R. & Nav. Co. (C. Ct. App. 9th Cir. May 6, 1912), 196 Fed. 336, 339.

switch that passes the car from the repair shop to the main track to resume its place in the company's system of traffic, or any of the operatives who thereafter handle it in such traffic."[19]

Repairing Interstate Cars in Transit.—The judgment in the Second Employers' Liability Cases[20] disposes of three cases involving the application of the Employers' Liability Act. In one of the cases (Walsh *v.* New York, New Haven, etc., R. Co.), the judgment in which was affirmed, the action was brought and damages were recovered by a personal representative of a deceased employee of a railroad company. The complaint alleged that the injury occurred while the defendant as a common carrier was engaged in commerce between some of the states, and while the deceased in the course of his employment by the defendant in such commerce was engaged in replacing a drawbar on one of the defendant's cars then laden with interstate commerce in transit and, of course, in use in such commerce. The statement of the facts is meager, but it would appear therefrom that the employee who was injured was not one of a train crew, but was a machinist or repairer whose duty it was to replace drawbars, and that the work was done either in a yard or on a switch, for the injury resulted from the negligence of fellow servants in pushing other cars against the one on which the deceased was working. On this state of facts, the Supreme Court of the United States declared that the decedent was engaged in interstate commerce at the time of his death, and that the cause of action which accrued therefrom was properly prosecuted under the Employers' Liability Act.[21]

Inspection and Repair of Cars Awaiting Transfer or Return.—An employee of a railroad company, charged with the

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19. Northern Pac. R. Co. *v.* Maerkl (Circuit Court App. Ninth Cr. Aug. 5, 1912), 198 Fed. 1, 4, 5, citing Interstate Commerce Commission *v.* Illinois Central R. R. Co., 215 U. S. 452, 474, 54 L. Ed. 280, 30 S. Ct. 155.

20. Repairing interstate cars in transit.—Second Employers' Liability Cases, 223 U. S. 1, 56 L. Ed. 327, 32 S. Ct. 169.

21. Same.—See Second Employers' Liability Cases, 223 U. S. 1, 56 L. Ed. 327, 32 S. Ct. 169, and Rich *v.* St. Louis, etc., R. Co. (St. Louis Ct. App. Mo. July 2, 1912), 148 S. W. 1011, 1013; Lamphere *v.* Oregon R. & Nav. Co. (C. Ct. App. 9th Cir. May 6, 1912), 196 Fed. 336, 339.

duty of seeing to the coupling of the cars and of the air brake pipes upon cars standing upon a switch track to be transferred to another company, some of which cars were being used in interstate commerce, was employed in interstate commerce while so engaged, and was within the provisions of the Employer's Liability Act of April 22, 1908.[22]

And where an engine and tender used by the defendant railroad company in hauling interstate trains between two points had reached the end of their run and had been placed on a fire track as usual to await the time for starting on the return trip, and the plaintiff, who was employed in making running repairs, was sent to replace a bolt which had been lost from a brake shoe of the tender, and while so employed was injured through the negligence of a fellow servant, it was held that the defendant was engaged in interstate commerce, and that plaintiff was employed therein at the time of his injury, within the meaning of the Act of April 22, 1908, and could maintain an action thereunder.[23]

The court in this case relied upon Walsh *v.* New York, New Haven & Hartford Railway Co., one of the Second Employer's Liability Cases, supra, in which the plaintiff was injured while replacing the drawbar of a car, and held that no line could be drawn between replacing a drawbar of a car and putting back a bolt into the brake shoe of a tender, nor between a fire track and any other kind of yard or terminal track.[24]

In the case of Heimbach *v.* Lehigh Valley Railway Company[25] the court, relying upon the decision of the Circuit Court of Appeals in the Pedersen Case, held that employees of a railroad company, injured while repairing a car of another company which had reached the end of its run, been unloaded, and was lying at

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22. Inspection and repair of cars awaiting transfer or return.—Johnson *v.* Great Northern R. Co. (C. Ct. App. 8th Cir. Mar. 14, 1910), 178 Fed. 643.

23. Same.—Darr *v.* Baltimore, etc., R. Co. (Dist. Ct. D. Md. June 22, 1912), 197 Fed. 665.

24. Same.—Darr *v.* Baltimore, etc., R. Co. (Dist. Ct. D. Md. June 22, 1912), 197 Fed. 665, 668.

25. Same.—Heimbach *v.* Lehigh Valley R. Co. (Dist. Ct. E. D. Penn. May 21, 1912), 197 Fed. 579, decided upon authority of Pedersen *v.* Delaware, etc., R. Co. (C. C. A.), 197 Fed. 537.

a station awaiting orders, were not at the time employed in interstate commerce within the Act of April 22, 1908. This case is contrary to the reasoning in other similar cases, and is to be read in the light of the fact that the opinion of the Circuit Court of Appeals upon which it rests has since been reversed.

Employees on Trains Carrying Both Kinds of Traffic.—Where an employee, a railroad engineer, for example, is injured while hauling a train containing cars employed in both interstate and intrastate commerce, he is himself engaged in interstate commerce, and entitled to sue under the Employer's Liability Act.[26] This is but an illustration of the doctrine laid down in the Second Employer's Liability Cases and in the Pedersen Cases that the operation of the act is not defeated by reason of the fact that the defendant and the employee were engaged in both interstate and intrastate commerce at the time of the injury.[27]

Same—Persons Employed Jointly by Railroad Company and Another—Pullman Employees, Express Agents, etc.—Persons employed jointly by a railway company and another company in the operation and management of a train are held to be employees of the railway company, within the meaning of the Employers' Liability Act.[28] Thus a porter on a Pullman car, owned jointly by the defendant railroad company and the Pullman Company, and operated by them as an association under a contract providing that the Pullman Company should have the management thereof, but that all obligations with reference to operation of the cars should be borne by the association, which should furnish one or more employees for each car, who at all times should be subject to the rules of the railroad company governing its own employees, that the earnings should be divided in certain proportions, and, in the event of liability arising against the railroad company for personal injuries to an employee of the

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26. Employees on trains carrying both kinds of traffic.—Horton *v.* Seaboard Air Line R. (S. Ct. N. C. Nov. 22, 1911), 72 S. E. 958.

27. Same.—Second Employer's Liability Cases, 223 U. S. 1, 56 L. Ed. 327, 32 S. Ct. 169, 38 L. R. A. (N. S.) 44; Pedersen *v.* Delaware, etc., R. Co., 228 U. S. —, Adv. Sh., 57 L. Ed. 648, 33 S. Ct. —.

28. Persons employed jointly by railroad company and another—Pullman employees, express agents, etc.—Oliver *v.* Northern Pac. R. Co. (Dist. Ct. E. D. Wash. N. D. Feb. 5, 1912), 196 Feb. 432, 435.

association, the railroad company should be liable only to the same extent it would be if the person injured were an employee in fact of the railroad company, and for all excess liability the railway company should be indemnified and paid by the owners of the car, was held to be an employee of the railway company within the Act of April 22, 1908; and hence his personal representatives were not precluded from recovering for his death resulting from the negligence of the railway company by a provision in his contract of employment purporting to release both the Pullman Company and the railway company from such liability.[29] There can be no recovery in such a case, however, where there is no testimony offered at the trial tending to show that the relation of master and servant existed between the deceased porter and the defendant company.[30]

On the other hand, an agent of an express company, employed and paid by it, and entitled, under a contract between the company and the railroad company, to ride on trains of the railroad and care for express matter on trains, is presumed to be a passenger while on a train in the discharge of his duty, and entitled to the protection of a passenger.[31] And where, in an action against the railroad company for the death of such express agent, the evidence of plaintiff shows that decedent was an agent of the express company, employed and paid by it, and entitled to ride on the trains of the railroad company under contract between the two companies, and that he was killed through the negligence of the employees in charge of the train, the railroad company, engaged in interstate commerce, and seeking to bring the case under the Federal Employers' Liability Act, must show that plaintiff's claim is unfounded, and that decedent was also in its employ, in order to avail itself of the federal act, and where it fails to do so, the state law will govern the right to recover.[32]

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29. Porter on pullman car.—Oliver *v.* Northern Pac. R. Co. (Dist. Ct. E. D. Wash. N. D. Feb. 5, 1912), 196 Fed. 432.

30. Same—Evidence to show relation of master and servant.—Oliver *v.* Northern Pac. R. Co. (Dist. Ct. E. D. Wash. N. D. Feb. 5, 1912), 196 Fed. 432, 434.

31. Express agent—Presumed to be a passenger, when.—Missouri, etc., R. Co. *v.* Blalack (S. Ct. Tex. June 5, 1912), 147 S. W. 559.

32. Same.—Missouri, etc., R. Co. *v.* Blalack (S. Ct. Tex. June 5, 1912), 147 S. W. 559.

Employees on Way to Report for Duty, Waiting to Go Out, etc.—A locomotive fireman in the employment of a railroad company engaged in interstate commerce, who was ordered by his superiors to report at a station to be transported with others to another station to relieve the crew of an interstate train, and who, when approaching the station over a crossing, was struck and killed through the negligence of other servants of the company, also operating an interstate train, was employed in interstate commerce at the time of his death within the meaning of the federal act.[33] In this case the court recognizes the fact that there is conflict over the proposition that an employee of a railroad company is engaged in the service of his employer, and is a fellow servant of other employees of the same master, while going to and from work, but holds that there can be no question that he is in the service of his master, and a fellow servant of his co-employees, whenever he is doing that which under his contract of employment he is bound to do, and emphasizes the fact that in this case the deceased, when killed, was not only on his way to work for his employer, but was proceeding under direct and peremptory command of the railroad company, and was on the premises of the company and in the discharge of his duty when he met his death at the hands of negligent co-employees operating a train engaged in interstate commerce and owned by the same railroad company.[34]

On the other hand, a fireman, whose run was wholly within the state, over a road owned by a company not engaged in interstate commerce, though the lessees thereof were, and who having oiled and prepared his engine, which was not then attached to any train, but which was to have hauled some freight, a part of which was interstate, was killed while crossing the tracks to his boarding house for a personal purpose, was held not to have been engaged in any kind of commerce at the time of the injury. In other words, at the time he was killed he was engaged upon

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33. **Employees on way to report for duty, waiting to go out, etc.**—Lamphere *v.* Oregon R. & Nav. Co. (C. Ct. App. 9th Cir. May 6, 1912), 196 Fed. 336.

34. **Same.**—Lamphere *v.* Oregon R. & Nav. Co. (C. Ct. App. 9th Cir. May 6, 1912), 196 Fed. 336, 337, 338.

his own, and not the company's business.[35] And where an extra conductor in the employ of a railroad company was directed, on reporting for work, to ride to another point within the same state for service on a work train, it not appearing that he was on his way to undertake any interstate service, and was injured while proceeding to his train, it was held that he was not at the time employed in interstate commerce within the purview of the federal act.[36]

Employees Preparing Interstate Trains to Go Out.— In the case of Neil *v.* Idaho Railway Company, it appeared that the plaintiff was employed by the defendant railway company as a freight conductor. On the day of the injury his train, consisting of about twenty cars, loaded with intrastate and interstate freight, had been made up, and he had gone to the engine on the front end of his train and had a conversation with his engineer, and had given him his clearance card and was going back to his caboose. It appears from the evidence that, at the time, the car inspector was inspecting the plaintiff's train, and the plaintiff, instead of returning to his caboose on the open space between the track on which his train was standing and the "scale track," on which the switching was being done, went upon the "scale track," and, according to his testimony, was inspecting his train as he proceeded on his way to the rear of his train. Whether it was necessary for the conductor to return from the engine to the caboose on his train does not appear, but it does appear that it was not necessary for him to walk on the "scale track." It was contended by counsel for the defendant that the plaintiff, in walking upon said "scale track," could not have been engaged within the scope of his employment; that there was nothing in his employment requiring that he should be on said "scale track;" that, on the contrary, the proper discharge of his duties would require that he should not be there. Answering this contention, the

35. **Same—Fireman crossing tracks on personal errand.**—Zachary *v.* North Carolina R. Co. (S. Ct. N. C. Nov. 9, 1911), 72 S. E. 858, 859.

36. **Conductor proceeding to take up duties on work train not shown to be interstate.**—Feaster *v.* Philadelphia, etc., R. Co. (Dist. Ct. E. D. Penn. May 21, 1912), 197 Fed. 580, decided on authority of Pedersen *v.* Delaware, etc., R. Co. (C. C. A.), 197 Fed. 537.

court said: "While it may not have been his duty and was carelessness on his part, under the facts of this case, to walk upon said 'scale track,' still we think he was engaged in interstate commerce to the extent of getting his train ready for that purpose. It seems to us that preparation was being made to have his train leave Spirit Lake, and that he was engaged in getting his train ready for the transportation of freight both within the state and beyond its boundaries, and that he was 'engaged in interstate commerce,' within the meaning of that term as used in said act of congress."[37]

Same—Employee Preparing Ice for Use on Train Carrying Both Kinds of Traffic.—An employee of an interstate railroad company, engaged at a terminal point in preparing ice for use in passenger cars carrying interstate and intrastate passengers, was held to be engaged in interstate commerce; and hence the defendant's liability was to be governed by the federal act, under which the defense of assumption of risk is available, unless the injury was caused by the employer's violation of a statute enacted for the safety of employees, and not by the state law which precluded the defense of assumption of risk in certain cases.[38]

Employee on Water Train Filling Tanks for Use of Through and Local Trains.—In an action against a railroad company for the wrongful death of a brakeman on its train which carried water to a tank within the state, the mere fact that some of the company's engines which took water at this tank pulled trains engaged in interstate commerce did not make the train on which deceased worked one engaged in interstate commerce, so as to make the federal statute govern the cause of action.[39]

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37. Employees preparing interstate train to go out.—Neil *v.* Idaho R. Co. (S. Ct. Idaho, June 4, 1912), 125 Pac. 331, 336.

38. Same—Preparing ice for train engaged in both kinds of traffic.—Freeman *v.* Powell (Tex. Civ. App. Ft. Worth, Dec. 23, 1911, rehearing denied Feb. 3, 1912), 144 S. W. 1033, writ of error denied, 148 S. W. 290, affirmed, no op.

39. Employee on water train.—Missouri, etc., R. Co. *v.* Fesmire (Tex. Civ. App. June 22, 1912, rehearing denied Oct. 12, 1912), 150 S. W. 201.

Switching Crews—Handling State and Interstate Cars —As Affected by Fact That Only Local Cars Being Handled at Time of Accident.—In the case of Behrens *v.* Illinois Central Railroad Company,[40] a fireman of one of the defendant's switch engines was killed while working on an intrastate train, although a good share of the time engaged in interstate commerce. The action was brought solely under the Federal Employers' Liability Act. He was a member of a switching crew, who reported for duty at a suburb of New Orleans, made up a train of empties intended for various destinations, and hauled these empties to another point near New Orleans, and from the second point hauled another train back to the starting point. At the time of the accident all of the cars of the train had originated at and were destined to points in the state. The court held that the employee killed was protected by the provisions of the federal act. In this case the court held that while the federal act is in derogation of the common law, yet as the elimination of the doctrine of fellow servants and the modification of the rules as to contributory negligence and assumption of risk make for the betterment of human rights as opposed to those of property, the law should, in the light of modern thought and opinion, be as broadly and as liberally construed as possible, and said:

"In this view of the case, I consider that the usual and ordinary employment of the decedent in interstate commerce, mingled though it may be with employment in commerce which is wholly intrastate, fixes his status, and fixes the status of the railroad, and the mere fact that the accident occurred while he was engaged in work on an intrastate train, rather than a few minutes earlier or later, when he might have been engaged on an interstate train is immaterial. If he was engaged in two occupations that are so blended as to be inseparable, and where the employee himself has no control over his own actions and cannot elect as to his employment, the court should not attempt to separate and distinguish between them."[41]

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40. Switching crew handling state and interstate cars—Where only local cars being handled at time of injury.—Behrens *v.* Illinois Cent. R. Co. (Dist. Ct. E. D. La. Dec. 30, 1911), 192 Fed. 581, cited in Lamphere *v.* Oregon R. & Nav.. Co. (C. Ct. App. 9th Cir. May 6, 1912), 196 Fed. 336, 338, and Carr *v.* New York Cent. & H. R. R. Co. (Sup. Ct. N. Y.), 136 N. Y. S. 501, 503.

41. Behrens *v.* Illinois Cent. R. Co. (Dist Ct E. D. La. Dec. 30, 1911), 192 Fed. 581, 582.

Switching Intrastate Car Out of Mixed Train.—On this point the Supreme Court of New York and the Federal Circuit Court for the Eastern District of Texas hold diametrically opposite views. In the former court it was held that a brakeman on a train running between points in that state, but consisting in part of freight cars consigned to points outside the state, injured by the negligence of a fellow servant while engaged at a siding in cutting out cars shipped from and billed to points in that state, was engaged in interstate commerce within the federal act, so that an action for his injury could be maintained thereunder; the court holding that his work at the siding was merely an incident to the operation of the entire train in interstate commerce.[42]

In the latter court, where a railroad brakeman was injured while engaged in making a flying switch to set out a car transported wholly in intrastate traffic, though it was a part of the train carrying both interstate and intrastate freight, it was held that his injury did not occur while he was engaged in interstate commerce, and therefore was not within the Act of April 22, 1908, the court being of the opinion that the service in which he was engaged at the time of the injury was wholly in furtherance of intrastate business.[43]

Switching Interstate Cars in Transit.—A switchman, engaged in switching in a railroad division yard a car loaded with freight and in transit from that state to another, is engaged in interstate commerce within the federal act.[44]

Switching Car Placed on Side Track for Repairs.—A freight car loaded with interstate freight, and placed on a side track in the railway yards at destination, to await simple repairs

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42. Switching intrastate car out of mixed train.—Carr *v.* New York, etc., R. Co. (Sup. Ct.), 136 N. Y. Supp. 501.

43. Same.—Van Brimmer *v.* Texas, etc., R. Co. (C. Ct. E. D. Jeff. Div. Oct. 2, 1911), 190 Fed. 394, 397.

44. Switching interstate cars in transit.—Rich *v.* St. Louis, etc., R. Co. (Mo. App.), 148 S. W. 1011. See, also, the following cases cited in the opinion: Chicago, etc., R. Co. *v.* Voelker, 129 Fed. 522, 65 C. C. A. 226, 70 L. R. A. 264; United States *v.* Colorado, etc., R. Co., 157 Fed. 321, 85 C. C. A. 27, 15 L. R. A. (N. S.) 167, 13 Ann. Cas. 893 (C. C. A. 8th Cir.); Norfolk, etc., R. Co. *v.* Unites, 177 Fed. 623, 101 C. C. A. 249 (C. C. A. 4th Cir.).

to the automatic coupler, is used in moving interstate commerce within the meaning of the Safety Appliance Act of March 2, 1893 (27 Stat. at L. 531, chap. 196, U. S. Comp. Stat. 1901, p. 3174), when a coupling with another car is thereafter attempted by the carrier's order, during the course of switching operations.[45] In this case, the car was marked "in bad order," and a repair piece sent for. Instead of withdrawing the car after thus being notified of its condition, the company kept on moving it about in connection with other cars, and finally ordered the injured employee to couple it to another car. This he tried to do with the natural result, and was crippled for life. The court held that the car was being used in interstate commerce at the time of the injury and that the case amply justified the verdict, and that the judgment should be affirmed.[46]

Breaking Up or Switching Train after Arrival at Terminus.—An engineer, killed in a collision occurring just after the arrival of his train from another state at the terminus of the road in the state in which the injury occurred, and while engaged in switching certain cars of his train preparatory to placing them in the yards according to orders previously received, was held to be engaged in interstate commerce at the time of the accident.[47]

Yard Clerk Taking Data from Cars Just Arrived.—In the case of St. Louis, etc., R. Co. *v.* Seale,[48] which arose in a state court of Texas and was afterwards taken to the Supreme Court of the United States on a writ of error, it appeared that the defendant was a Texas corporation owning and operating a railroad extending from the boundary between Oklahoma and Texas southward through North Sherman. This railroad connected at the Oklahoma boundary with another one extending northward

45. Switching car placed on side track for repairs.—Delk *v.* St. Louis, etc., R. Co., 220 U. S. 580, — L. Ed. —, 31 S. Ct. 617.

46. Same.—Delk *v.* St. Louis, etc., R. Co., 220 U. S. 580, — L. Ed. —, 31 S. Ct. 617, 620.

47. Breaking up, or switching train, after arrival at terminus.—Kansas City, etc., R. Co. *v.* Pope (Tex. Civ. App. Ft. Worth, Nov. 9, 1912, rehearing denied Dec. 14, 1912), 152 S. W. 185.

48. Yard clerk taking data from cars just arrived.—St. Louis, etc., R. Co. *v.* Seale, 228 U. S. —, Adv. Sheets, 57 L. Ed. 651, 33 S. Ct. —, reversing 148 S. W. 1099.

through Madill, and the two were so operated that trains were run through from North Sherman to Madill, and from Madill to North Sherman. The defendant was engaged in both intrastate and interstate commerce, much the larger part of the traffic handled in its North Sherman yard being interstate. The deceased was employed by the defendant as a yard clerk in that yard, and his principal duties were those of examining incoming and outgoing trains and making a record of the numbers and initials on the cars, of inspecting and making a record of the seals on the car doors, of checking the cars with the conductor's lists, and of putting cards or labels on the cars to guide switching crews in breaking up incoming, and making up outgoing trains. His duties related to both intrastate and interstate traffic, and at the time of his injury and death he was on his way through the yard to one of the tracks therein to meet an incoming freight train from Madill, Oklahoma, composed of several cars, ten of which were loaded with freight. His purpose in going to the train was that of taking the numbers of the cars and otherwise performing his duties in respect to them. While so engaged he was struck and fatally injured by a switch engine, which, it was claimed, was being negligently operated by other employees in the yard. Upon this state of facts the court said:

"In our opinion the evidence does not admit of any other view than that the case made by it was within the Federal statute. The train from Oklahoma was not only an interstate train, but was engaged in the movement of interstate freight; and the duty which the deceased was performing was connected with that movement, not indirectly or remotely, but directly and immediately. The interstate transportation was not ended merely because that yard was a terminal for that train, nor even if the cars were not going to points beyond. Whether they were going further or were to stop at that station, it still was necessary that the train be broken up and the cars taken to the appropriate tracks for making up outgoing trains, or for unloading or delivering freight, and this was as much a part of the interstate transportation as was the movement across the state line."[49]

Employees Engaged in Loading or Unloading Cars.—An employee of a railroad engaged in interstate commerce, who

49. Same.—St. Louis, etc., R. Co. *v.* Seale, — U. S. —, 57 L. Ed. 651, 653, — S. Ct. —, Mr. Justice Lamar, dissenting.

shows that he was injured while loading rails on a flat car in consequence of the negligence of fellow servants, but who does not show whether the rails were old or new, where they came from, where they were to be taken, or where the car was to go when loaded, is not entitled to the benefit of the federal act.[50] Likewise the unloading of steel rails from a car after they had reached their destination, in which service plaintiff was injured, was held not to be interstate commerce, within the Act of April 22, 1908.[51] In this last case, the defendant, a common carrier engaged in interstate commerce, having purchased certain rails, after their arrival at destination, caused them to be moved to the place where they were to be laid, and employed plaintiff and other servants to unload them from the cars. Plaintiff was injured by the dropping of one of the rails on his foot, due to the negligence of his fellow servants. It was held that such service was not work done in interstate commerce; and hence plaintiff could not recover under federal act.[52]

Employee Returning from Work on Train.—An employee of a railroad company engaged in interstate commerce, who was killed in a collision while riding to his home, by permission, on one of the company's trains, but who was not at the time, and, so far as appeared, had not just previously been employed in interstate commerce, was not within the Act of April 22, 1908, and there could be no recovery for his death thereunder.[53]

Where Intrastate Road Leased to Interstate Carrier.—A railroad corporation whose tracks lie wholly within a certain state does not, by leasing its tracks to a railroad corporation engaged in interstate commerce, itself engage in interstate com-

50. Employees engaged in loading or unloading cars.—Tsmura *v.* Great Northern R. Co. (S. Ct. Wash. May 11, 1910), 108 Pac. 774.

51. Same.—Pierson *v.* New York, S. & W. R. Co. (N. J.), 85 A. 233.

52. Same.—Pierson *v.* New York, etc., R. Co. (Ct. Err. & App. of N. J. Nov. 21, 1912), 85 Atl. 233.

53. Employees returning from work on train.—Bennett *v.* Lehigh Valley R. Co. (Dist. Ct. E. D. Penn. May 21, 1912), 197 Fed. 578, decided on authority of Pedersen *v.* Delaware, etc., R. Co. (C. C. A.), 197 Fed. 537.

merce.[54] But since a railroad corporation can not escape its responsibility by leasing its road, it is still liable for its lessee's acts, both of commission and omission, whether they occur in interstate or intrastate commerce, although the lessor is not actually engaged in either.[55]

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(TO BE CONTINUED.)

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54. Where intrastate road leased to interstate carrier.—Zachary *v.* North Carolina R. Co. (S. Ct. N. C. Nov. 9, 1911), 72 S. E. 858.

55. Same.—Zachary *v.* North Carolina R. Co. (S. Ct. N. C. Nov. 9, 1911), 72 S. E. 858, 859.